Background Paper

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CONSTITUTIONAL PROPOSALS OF THE FEDERAL GOVERNMENT, SEPTEMBER 1991

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CONSTITUTIONAL PROPOSALS OF THE FEDERAL GOVERNMENT, SEPTEMBER 1991

INTRODUCTION

On 24 September 1991, the Government of Canada published a document called *Shaping Canada's Future Together: Proposals*, which suggested a series of possible constitutional changes. The new Proposals were the result of a political deadlock that had been in the making since the patriation, in 1982, of the Canadian Constitution, with a new amending formula and a *Charter of Rights and Freedoms*, and had crystalized with the failure of the Meech Lake Accord in June 1990.

When the *Constitution Act, 1982*, came into effect, many Quebeckers felt that Premier Levesque had been betrayed by his provincial counterparts, who had negotiated a sudden compromise with the federal government without Quebec representation. At the same time, a number of other provinces felt they had been forced into accepting an unwanted *Charter of Rights and Freedoms* because of a conflict that was not between anglophones and francophones, but rather between two very different views of Quebec in Canada, represented by the then Prime Minister and the Premier of Quebec.

Over the next several years, Quebec maintained its position that such a major constitutional change could not acquire political legitimacy without Quebec's participation and concurrence. In late 1985, the Liberal government of Premier Bourassa came to power in Quebec; it announced five constitutional changes that would be necessary for Quebec's acceptance of the 1982 Act and the province's renewed participation in the Canadian federation:

1. recognition of Quebec as a distinct society;
2. a greater provincial role in immigration;
3. a provincial role in appointments to the Supreme Court of Canada;
4. limitations on the federal spending power; and
5. a veto for Quebec on constitutional amendments.

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The *1987 Constitutional Accord,* commonly known as the Meech Lake Accord, was the result of federal-provincial negotiations to implement those changes in a manner acceptable to all provinces. It dealt with Quebec's five concerns, as well as appointments to the Senate and provisions for annual First Ministers' conferences on the economy and on constitutional reform. It was signed by the Premiers of all ten provinces.

As a complete package, the Accord required the unanimous approval of all 10 provincial legislatures in order to become effective. As is well known, that did not come before the deadline of 23 June 1991. At least part of the problem was due to the fact that the amending formula adopted in 1982 had never been used on any controversial issue. Thus there were mixed opinions as to the difficulty of amending a resolution that had already been passed by one or more legislatures, as to whether the amendments requiring different degrees of provincial consent could be "unbundled" or proclaimed separately, and as to the time limits that applied before the Accord became ineffective.

In two provinces, Manitoba and New Brunswick, the provincial governments changed before the Accord was ratified and committees were established to study the proposed constitutional changes. When the two committees reported, it became clear that a major concern was the process by which the Meech Lake Accord had been formed and approved without public input or public hearings. On 21 March 1990, New Brunswick tabled a "companion resolution," amending the Meech Lake Accord in relatively minor respects.

Additionally, Newfoundland and Labrador acquired a new government, whose leader, himself a constitutional lawyer, objected vigorously to the Accord. In March 1990, Newfoundland and Labrador presented a "Proposal for a Revised Constitutional Accord," and on 6 April 1990 Newfoundland and Labrador rescinded approval of the Accord.

On 21 March 1990, the New Brunswick "companion resolution" was referred to a Special Committee of the House of Commons (the Charest Committee) with instructions to report by 18 May 1990. Notwithstanding the Report of this Committee, the Meech Lake Accord did not receive the required provincial approval by the deadline.

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This paper summarizes the current Proposals within the context of these events.

THE PROPOSALS

The new constitutional Proposals are divided into three parts, together with an introduction and a conclusion. The introduction emphasizes the reasons for constitutional reform:

> Canada has changed significantly since 1867;
>
> Aboriginal Canadians are frustrated by a Constitution that does not fully recognize their place in Canadian society;
>
> Quebec's desire for recognition of its distinct nature and for more control over areas that are inherent to that distinctiveness must be addressed;
>
> Other areas of Canada are also increasingly critical of the lack of responsiveness and possible inefficiency of our existing federal system; and
>
> Global economic forces place pressure upon states to form larger economic unions and yet at the same time decentralize their political decision-making.

Parts I, II and III, in general terms, deal with overarching principles, institutional reforms, and reforms to the economic union. The conclusion reiterates that many Canadians, from all areas of the country, feel that the Constitution must be reformed to better reflect an equitable arrangement between the original Canadian partners and adapt the Constitution to modern social and economic reality. The Proposals are to be referred to the Special Joint Committee of the House of Commons and Senate on a Renewed Canada, in the hope that a broad, informed and specific public debate will take place. After the Committee reports in early 1992, the Government will propose to Parliament a plan for a renewed Canada. The overall intent is to work towards a shared vision of the country that can be reflected in a renewed Constitution.(1)

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(1) The complete text of the proposals, as found on p. 51-59 of *Shaping Canada's Future*, are included in Appendix 1.

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The Proposals appear to deal only with those issues on which the Government feels the Constitution can be amended by the 7/50 formula, or by seven provincial legislatures representing 50% of the population. In certain areas, such as the entrenchment of the Supreme Court of Canada, including its membership, and the amending formula itself, the government says only what it would be prepared to do "were it found desirable to proceed with any unanimity items in the final package."

In addition, some of the Proposals seem to be attempts to replace, within certain areas, the general amending formula with amending formulas that would require the approval of governments rather than of legislatures; this would avoid the necessity of legislatures having to consent to all amendments (Proposals 14, 15, 16). Possibly the move to constitutionalize agreements on immigration and culture (Proposals 19 and 20) is also an attempt to replace the 7/50 formula with the section 43 formula, wherein an amendment that applies to one or more, but not all, provinces can be made by the federal government and the provinces to which it applies.

A. Part I: Shared Citizenship and Diversity

Part I of the Proposals, by and large, deals with defining various aspects of the Canadian identity within the Constitution. It proposes a view of the deeply felt core values which form a distinct Canadian identity, and includes seven of the 28 Proposals made, including:

1. strengthening the *Charter of Rights and Freedoms* by guaranteeing property rights and by limiting the right of governments to override the Charter using the "notwithstanding clause";

2. recognizing Quebec's distinctiveness and Canada's linguistic duality within the Charter;(2)

3. a commitment to aboriginal participation in the current constitutional deliberations;

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(2) Appendix 2 continues this new constitutional Proposal in context, as set out in p. 14 of the Proposals.

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4. a proposal to entrench a general justiciable right to aboriginal self-government "within the Canadian federation and subject to the *Canadian Charter of Rights and Freedoms*";

5. the entrenchment in the Constitution of a process to address outstanding aboriginal matters;

6. the representation of aboriginal peoples in the Senate; and

7. the inclusion of a "Canada clause" at the beginning of the Constitution.

In Part I as in the rest of the document, some proposals are constitutional amendments that are either already drafted or are sufficiently specific that the drafting could be easily accomplished. Other proposals are for constitutional amendments or adjustments that are too general to be drafted on the basis of the document, or for commitments to unilateral federal actions within exclusive federal jurisdiction.

For example, Proposal 2 (Quebec as a distinct society) and the latter half of Proposal 1 (limiting the notwithstanding clause) are drafted or immediately draftable. The first part of Proposal 1 (property rights), Proposal 4, Proposals 6-7, and perhaps Proposal 5, refer to constitutional amendments but require clarification. Proposal 3, a commitment to aboriginal participation, is probably within the federal government's existing power.

Of the specific Proposals, both parts of Proposal 1 have received considerable previous attention. The concept of entrenching property rights in the Constitution was a part of the negotiations preceding the *Constitution Act, 1982,* but was dropped, largely because of the provinces' concerns that it would impinge upon their legislative powers. The "notwithstanding" clause was a crucial demand of provincial premiers in 1981-82, because of concerns both that some degree of parliamentary supremacy should remain in place and that the courts might bring down decisions that were simply too expensive for some provinces to implement. The current proposal is that section 33 of the Charter, the override provision, should require the consent of 60% of the Members of Parliament or a provincial legislature, rather than a simple majority.

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Proposals 2 and 7, recognizing Quebec's distinctiveness in the *Charter of Rights and Freedoms* and proposing a "Canada clause" that would also refer to Quebec as a distinct society, are likely to draw considerable attention. Recognition of Quebec as a distinct society is at the heart of Quebec's constitutional position, but the "distinct society" clause in the Meech Lake Accord drew a large proportion of the criticism directed at the package. The Meech Lake Accord would have resulted in Quebec's position as a "distinct society" appearing in section 2 of the Constitution of Canada.(3) Overall, section 2 would have introduced an interpretive clause into the Constitution outside the Charter for the first time.

Although the criticism of section 2 as proposed in the Meech Lake Accord had been widespread for both technical and substantive reasons, the comments of the Manitoba Committee had drawn the most attention. These suggested that any interpretive principle should not be limited to linguistic duality and the distinctiveness of Quebec, but should be a "Canada clause" describing the fundamental characteristics of the society as a whole: the federal nature of the state and its distinct identity; the existence of aboriginal peoples; linguistic duality; the distinct society of Quebec; and Canada's multicultural heritage.

Proposal 2 of the present package would move the "distinct society clause" to the Charter, apparently in response to the concern that the Constitution as a whole not be interpreted on such a narrow basis. It would also define more clearly the "distinctness" of Quebec as a French-speaking majority with a unique culture and a civil law tradition. This is presumably an attempt to address concerns that the absence of such qualifications would have left it open for the courts to interpret any such clause as going beyond linguistic, cultural and legal differences. Additionally, adding culture and the civil law to the definition of "distinctness" would clarify that the clause was not simply a matter relating to the "use of the English or the French language," which would require unanimous consent under the current amending formula.

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(3) Canada's *Constitution Act* has not had a section 2 since an archaic provision referring to the monarch was repealed in 1893.

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Proposal 7 appears to be a response to the Manitoba Report's suggestions for a "Canada clause," although it goes well beyond their relatively precise statement of what should be included. Arguably, if the Proposal became an interpretive clause, it could give the courts a free rein as to how the Constitution of Canada should be interpreted.

An additional point of contention may well be the choice of the words "preserve and promote" to describe the responsibilities of the government of Quebec in Proposal 7, and of the words "preservation and promotion of Quebec as a distinct society within Canada" in Proposal 2. The Meech Lake Accord stated that the Constitution of Canada would be interpreted in a manner consistent with "the role of the legislature and Government of Quebec to "preserve and promote" the distinct identity of Quebec, whereas the role of the Parliament of Canada and the provincial legislatures would have been only to "preserve" the fundamental characteristics of Canada. The difference between "preserve and promote" and "preserve" became a serious point of contention; the Manitoba Report, the New Brunswick Resolution, the Newfoundland Proposals and the Charest Committee in one way or another all recommended that the two phrases be made parallel. Both in Proposal 2 and Proposal 7 the role of Quebec to "preserve and promote" its special culture is in contrast to the use of the word "preserve" in other sections of the Proposals.

On the other hand, Proposal 2 would place the interpretive clause relating to the distinct society in a new section 25.1.(4) Sections 25-27 refer to the limitations set on the *Charter of Rights and Freedoms* by aboriginal rights (section 25), existing rights and freedoms (section 26), and the preservation and enhancement of the multicultural heritage of Canadians (section 27). None of these sections has been noticeably effective in influencing court decisions. The Meech Lake Accord had stated that nothing in the distinct society clause would have affected section 25 or 27 of the Charter.

Proposals 3-6 all deal with the aboriginal peoples and constitutional reform. Proposal 3, committing the Government of Canada to ensure that aboriginal peoples participate in current constitutional

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(4) See Appendix 2.

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deliberations, is presumably self-fulfilling. Proposal 5, entrenching a constitutional process to ensure that aboriginal matters are addressed, would not be difficult to draft. A similar proposition, ensuring an annual First Ministers' Conference on aboriginal affairs was added to the Constitution immediately following the 1982 amendments. Proposal 6, aboriginal representation in the Senate, would seem to be dependent upon the Senate reforms referred to in Proposals 8 and 9.

Proposal 4 would "entrench a judiciable right to aboriginal self-government within the Canadian federation and subject to the *Canadian Charter of Rights and Freedoms*," with the nature of the right to self-government described so as to facilitate interpretation of that right by the courts. This may well be the most difficult Proposal to put into practice. The Government Proposals suggest that the enforceability of this amendment should be delayed for a period of up to 10 years and that "the Special Joint Committee should examine the broad parameters of the right to be entrenched in the Constitution and the jurisdictions that aboriginal governments would exercise." It is not entirely clear whether the proposal to entrench aboriginal self-government within ten years would affect the amending formula itself.

B. Part II: Responsive Institutions for a Modern Canada

Part II of the Proposals deals with the issue of revitalizing Canada's political institutions. It proposes that our basic parliamentary institutions should be reformed so that they are: democratic; effective; perceived to represent Canadians fairly and responsibly; and reflective of the diversity of peoples and opinions within the country. Part II proposes fundamental reform of Canada's political institutions, and comprises six of the 28 proposals:

8. The Government of Canada commits itself to a process of further parliamentary reform.

9. The Senate should be reformed into an elected, effective and more equitable body.

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10. The Special Joint Committee of Parliament shall consider the form of direct election to the Senate; the appropriate number and distribution of Senate seats; and, in consultation with the aboriginal peoples, the appropriate representation of Canada's First Peoples.

11. The Senate should be given a mandate to ratify the appointments of the head of various institutions having effects on federal-provincial relationships.

12. The Government of Canada proposes a constitutional amendment that the provinces and territories be given a role in Supreme Court appointments.

13. If a consensus on the amending formula can be arrived at, the Government of Canada is prepared to proceed with the Meech Lake changes, provided that the creation of new provinces is subject to the 7/50 formula rather than unanimity, and that an agreement is reached on any items requiring unanimous consent.

Proposal 8, dealing with reforms to the House of Commons, is presumably within the exclusive jurisdiction of the Government.

Proposals 9-11 deal with the Senate. On the basis of the existing Constitution, the proposal of an elected Senate (Proposal 9) is within the 7/50 amending formula. There is, however, some ambiguity in the provisions as to how Senate seats should be distributed. Proposal 9 refers to (1) the unfairness of present provincial representation, (2) the need to replace regional representation with provincially based representation, and (3) the need to take into account: Canada's linguistic duality; the immense difference in provincial populations; the small number of provinces in Canada; the need for aboriginal representation; and the method of election of the House of Commons. The method of election of Senators should also take into account the history of inadequate representation of women, aboriginal peoples, and ethnic groups, as well as the proposals of the Macdonald Commission on the Economic Union.

Senate reform would be based on the principles of an elected, effective and more equitable Senate including:

> direct election at the same time as elections to the House of Commons; more equitable provincial and territorial representation;

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approval of legislation by both the House of Commons and the Senate required as a general rule as at present, although only the House of Commons could defeat the government;

no legislative role for the Senate with respect to money bills and a six month suspensive veto only on matters of national importance;

a double majority (majorities of both anglophone and francophone members) on matters of language and culture;

guaranteed representation for aboriginal Canadians in the Senate; and

the continuation of the Senate's mandate to conduct special inquiries.

Proposal 10 refers the following issues to the Special Joint Committee: the form of direct election to the Senate; the appropriate number and distribution of Senate seats; and, in consultation with the aboriginal peoples, the appropriate representation of Canada's First Peoples.

Proposal 11 suggests that the reformed Senate would approve the appointments of the heads of institutions with federal-provincial responsibilities, including the Canadian Broadcasting Corporation, the National Film Board, the National Library, the National Archives, the national museums, the Canada Council and the National Arts Centre, as well as the heads of regulatory boards and agencies such as the National Energy Board, the National Transportation Agency, the Canadian Radio-television and Telecommunications Commission, the Immigration and Refugee Board, and the proposed Canadian Environmental Assessment Agency.

The Proposals for Senate reform go far beyond those in the Meech Lake Accord, to which the main criticism was that they would block future Senate reform by requiring unanimous consent. The current Proposals would not affect the amending formula with respect to Senate reform. A second criticism of the Meech Lake proposals was that the two Territories would have been left out of the nominating process. This was generally considered to have been an oversight, and was corrected so that any references to the provinces now also include a reference to the Territories.

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Proposal 12 proposes an amendment to ensure that appointments to the Supreme Court of Canada would be made by the Government of Canada from a list provided by the governments of the provinces and Territories. Entrenchment of the Supreme Court of Canada would also be acceptable if it were found desirable to proceed with any unanimity items in the final package.

It is generally accepted that the federal government has evolved a process resulting in high-quality and non-political Supreme Court appointments. The major criticisms of the Meech Lake provisions for the Supreme Court were that provincial appointments might be biased, and that there was no mechanism for breaking the deadlock if provincial nominees were unacceptable to the federal government. Proposal 12 provides that the federal government could make appointments if the provincial Ministers of Justice or Attorneys-General did not submit lists within the required 90 days, but does not otherwise address the issue of deadlock.

The final criticism of the Meech Lake amendments on appointments to the Supreme Court was that the two Territories were not included in the process. This was more complex than the omission of the two Territories from appointments to the Senate, because the Territories currently have a right to one Senator each but have no corresponding right to representation on the Supreme Court. As the Proposals note:

> The *Supreme Court Act* ensures that at least three of the nine Supreme Court justices appointed are from the Quebec bar, the only province with a civil law system. Three justices usually come from Ontario, two from the West and one from Atlantic Canada.

Proposal 12 would ensure that the two Territories would be consulted on appointments, but it is not clear into which of these conventional geographic divisions any potential nominee from the Territories would fall.

Entrenchment of the Supreme Court of Canada is, overall, not a contentious issue except for the fact that changes to its composition require unanimous consent.

Proposal 13 suggests that a new amending formula would also be acceptable to the Government of Canada if a package of items requiring

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unanimous consent were agreed upon, and the creation of new provinces out of the Territories continued to be under the 7/50 formula. This requirement for unanimity precluded dealing with a Quebec veto within the Proposals themselves. The Special Joint Committee on the Amending Formula (the Beaudoin-Edwards Committee) recommended the longstanding formula that vetoes be accorded to Ontario, Quebec, any two of the Atlantic provinces, and any two of the western provinces having 50% of the population of the western provinces; however, the new Proposals note that this "recommendation has failed to attract the unanimous support which would be required to change the amending formula."

It has been generally considered, however, that providing full compensation for opting out of federal programs or constitutional amendments is the next best thing to a veto; that right would be strengthened by the Proposals. Peter Hogg had said in discussing the Meech Lake proposals:

> Opting-out is still not a veto, but opting-out with compensation is regarded by Quebec as a sufficient safeguard against losses of provincial powers.(5)

C. Part III: Preparing for a More Prosperous Future

Part III of the Proposals deals with the economic union and proposes 15 reforms based on two principles:

1. many elements of the Canadian federation need not be changed; and

2. the Government of Canada will maintain its ability to ensure that all Canadians continue to receive the benefits of Canadian citizenship, regardless of where they live or what they do.

This second principle is based on the premises that:

- the federal government must be able to express the Canadian identity and achieve common Canadian goals;

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(5) Peter Hogg, Meech Lake Constitutional Accord, Annoted, Carswell, Toronto, 1988, p. 47.

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- federalism reconciles the need for strong common powers in a central government with different needs and objectives that should be pursued by the provinces;

- "simplicity," or keeping government as close to the people as possible, is a desirable goal; (this is known in the European Community as "subsidiarity.")

- joint action by the federal and provincial governments, whether entrenched in the Constitution or not, is essential.

The Proposals in Part III are:

14. broadening section 121, the common market clause;

15. enhancing federal powers to manage the Economic Union (section 91A);

16. harmonizing economic policies by establishing federal-provincial guidelines;

17. reforming the *Bank of Canada Act;*

18. a constitutional amendment to clarify that training is an exclusive area of provincial jurisdiction (Labour Market Training);

19. the constitutionalization of federal-provincial agreements on immigration (Immigration);

20. the constitutionalization of agreements on culture, where appropriate (Culture);

21. consultation with the provinces on issues under CRTC jurisdiction, together with further administrative regionalization of the CRTC (Broadcasting);

22. the discontinuance of the residual power except for POGG (Peace, Order and Good Government) and the transfer to the provinces of the powers to deal with non-national matters not specifically assigned to the federal government by the Constitution or by virtue of court decisions (The Residual Power);

23. the removal of the federal declaratory power, which is considered by some commentators to be defunct;

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24. recognizing more clearly certain areas of provincial jurisdiction, including tourism, forestry, mining, recreation, housing and municipal/urban affairs;

25. endorsement by the Government of Canada of the recommendation of the Beaudoin-Edwards Committee that there should be a constitutional provision for legislative delegation between the federal and provincial bodies;

26. identifying areas of jurisdiction that are "candidates for streamlining": drug prosecutions; wildlife conservation and protection; the transportation of dangerous goods; soil and water conservation; ferry services; small craft harbours; some aspects of financial sector regulation; some aspects of bankruptcy law; some aspects of unfair trade practices; and inspection programs;

27. certain limitations on the exercise of the federal spending power in areas of exclusive provincial jurisdiction;

28. a proposed Council of the Federation, which would be an amalgam of various proposals on how the basics of federal-provincial relations could be managed more effectively.

Proposals 14 to 16 involve a complex amalgam of (1) previous proposals on the economic union (which have always foundered on provincial dissent), (2) the principles of section 6 of the Charter (personal mobility rights): (3) section 121 of the *Constitution Act, 1867* (4) the existing amending formula but referring to governments rather than legislatures and (5) the proposed override formula.

In some important ways, Proposals 14, 15 and 16 are less concerned with constitutional change than with new mechanisms for coordinating economic policies. Proposal 14 would replace the existing section 121, referred to as the "common market clause," which provides that goods from any province shall be admitted freely into the other provinces. It is generally accepted that this provision is somewhat archaic in that non-tariff barriers have replaced tariff barriers as the major impediment to mobility.

The proposed new section 121 would refer to people, capital and services as well as goods. No legislative body or government would be

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allowed to contravene the principle of free movement within the economic union by either law, in the case of legislative bodies, or practice, in the case of governments.

There would, however, be some very significant exceptions: federal laws to further the principles of equalization or regional development; provincial laws to deal with intra-provincial inequalities; and laws (whether federal or provincial) declared by Parliament to be in the national interest. In the last case, no such declaration would be effective unless agreed to by seven out of the 10 provinces with 50% of the population. Thus, although the new section 121 would be far broader, and more attuned to modern economic realities, than the existing section 121, it would also provide for exemptions not found in the current section.

It is not clear how broadly these exemptions might be interpreted. Section 6 of the Charter, dealing with personal mobility rights, contains a similar exemption, in subsection (4), for regionally disadvantaged areas. This has yet to be tested by the courts. The marginal notation for section 6(4) refers to "affirmative action programs," and it is unclear how far such economic affirmative action might go before being found invalid.

Proposal 15 would provide for a new section 91A to assist in managing the economic union. It would allow the Parliament of Canada, if it could obtain provincial consensus, to make any law, provided it was declared to be "for the efficient functioning of the economic union." The law would be ineffective, however, unless it was approved by the governments of seven provinces having 50% of the national population. When a law was so approved, a province that disagreed could, by a resolution supported by 60% of the members of its legislature, make a counter-declaration that the law did not apply within that province.

On the face of it, the new section would allow Parliament to enact national economic standards where there was a sufficient consensus. However, Proposal 15 is also described as providing "a mechanism for shared management of the economic union by the federal and provincial governments [which] would allow for the transfer and/or decentralization of powers and responsibilities in a number of specific sectors to bring decision-making closer to the people."

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Proposal 16 refers to guidelines to improve the coordination of fiscal policies within the country, and to harmonize fiscal and monetary policy. The suggested mechanisms are outlined in more detail in *Canadian Federalism and the Economic Union: Partnership in Prosperity*, the first follow-up document to the Proposals. If consensus can be achieved, any new federal-provincial agreement would become federal legislation under the provisions of the proposed new section 91A.

Proposal 17 suggests legislation to clarify that the mandate of the Bank of Canada is to "achieve and preserve price stability." Other provisions would increase provincial involvement with the Board of Directors and provide for improved communications between the Governor of the Bank and political leaders.

Proposal 18 relates to a field (labour market training) that may already be in exclusive provincial jurisdiction. The federal government appears to have moved into this area under the constitutional amendment of 1940, which gave it exclusive jurisdiction over unemployment insurance. Proposal 18 would merely redefine within the Constitution that labour market training, as education, is indeed a provincial field of jurisdiction.

Proposal 19 deals with immigration, noting that it is one of the few areas of concurrency in the existing Constitution (section 95). That concurrency, however, is subject to federal paramountcy. The Meech Lake Accord had set out a rather complex procedure to constitutionalize or entrench immigration agreements between the federal government and the provinces.

Enhanced control over immigration matters was one of Quebec's five Pre-Meech conditions. However, the actual entrenchment of federal-provincial agreements in the Constitution, and more specifically the Cullen-Couture agreement with Quebec, became a matter of considerable concern. For example, the Manitoba Report felt it unwise to entrench in the Constitution the guarantee that Quebec would receive a number of immigrants "proportionate to its share of the population of Canada, with the right to exceed that figure by 5% for demographic reasons." First, the Report wondered if some other province might receive less than its fair share to

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compensate for that additional 5%. Second, and more important, it wondered whether a drop in immigration to Quebec in any given year would require a lowering of the national quota. The latter fear was allayed by a federal opinion that the "guarantee" referred to was a "best efforts" undertaking rather than a strict legal guarantee.

The question remains as to whether entrenching agreements that might affect the rights of other provinces would require a 7/50 amendment or could be accomplished simply between the federal government and the province involved.

Culture (Proposal 20), is already within provincial jurisdiction, aside from the use of the federal spending power (Proposal 27). The most likely issue to be discussed in federal-provincial agreements is a transfer of funding.

Proposal 21 (Broadcasting) suggests that the CRTC consult with the provinces on the issue of licences and further regionalize its operations.

Proposal 22, the Residual Power, would generally appear to redefine and clarify the status quo.

Proposal 23 suggests removing the federal declaratory power, which is often considered to be politically, if not legally, defunct. Proposals 14 and 15, however, would re-introduce a new concept of a federal declaratory power.

Proposal 24 would involve clarifying within the Constitution areas that are within provincial jurisdiction: tourism, forestry, mining, recreation, housing and municipal/urban affairs. The issue in these areas is less a question of jurisdiction than of whether funds should be transferred to the provinces when the federal government gives up its programs.

Proposals 25 and 26 would involve streamlining government so as to avoid overlap and duplication. Proposal 25 suggests providing for legislative delegation, in addition to existing administrative delegation. There has been considerable public discussion on the issue of legislative delegation, which has many advantages. The chief disadvantage is usually seen as a confusion of responsibility within the parliamentary system.

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Proposal 26 would involve a clarification of federal government powers in areas of ambiguous constitutional jurisdiction. Inspection programs would presumably be coordinated with the provinces. The transportation of dangerous goods might well be a contentious issue, since such goods often cross interprovincial lines.

Proposal 27 would commit the Government of Canada not to introduce new shared-cost programs and conditional transfers in areas of provincial jurisdiction. This commitment would be entrenched in the Constitution, together with a provision that non-participating provinces establishing their own programs would receive financial compensation.

As the federal proposals note:

> The federal spending power is not defined in the Constitution, but it has been confirmed very clearly by the Supreme Court. It is inferred from the federal government's comprehensive taxing power and its control over "the public debt and property."
>
> In practice, the spending power encompasses the expenditures of the federal government in a broad range of areas and in a broad number of forms (for example, Canada-wide shared cost programs with the provinces such as healthcare; bilateral federal-provincial agreements, such as regional-development agreements; or federal payments to organizations and individuals, such as Canada Council grants).

Limitations on the federal spending power was one of Quebec's five pre-Meech conditions, and Proposal 27 is a variation of the Meech Lake Accord provision on shared-cost programs. This would have added a new section 106A, just after section 106, the section providing for appropriations by Parliament from time to time. Section 106A would have required the federal government to compensate provinces in a manner similar to that suggested in the current Proposals.

There is, however, an inherent conflict between compensating provinces for opting out of such programs and the concept of equalization payments. The first approach allows the richest provinces to be compensated even if they establish programs above the national standards; the second focuses on compensating provinces that have financial difficulty in meeting the national standards. Consequently, the Manitoba Report

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suggested deleting clause 106A, the New Brunswick Committee suggested linking it to the commitment to equalization payments in section 36 of the Charter (where most proposals would also put any potential "Social Charter"), the Newfoundland proposals would have exempted programs declared by Parliament to be a response to the commitments expressed in section 36(1), and the Charest Committee recognized the link between section 36 and the spending power but felt it was too complicated an issue to be dealt with immediately.

Finally, Proposal 28 suggests the entrenchment of a Council of the Federation, composed of federal, provincial and territorial governments, that would meet to decide on "issues of intergovernmental coordination and collaboration." The Council is described in some detail on page 42 of the Proposals.(6)

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(6) See also Mel Smith, "A Model for the Council of the Federation," *The Renewal of the Federation: A British Columbia Perspective*, British Columbia, Ministry of the Provincial Secretary, May 1991, p. 39-44.

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APPENDIX 1

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Appendix I
List of Proposals

Part I: Shared Citizenship and Diversity

1. Reaffirming the rights and freedoms of citizens. The Government of Canada reaffirms the basic rights set out in the Charter as a fundamental feature of the Canadian Constitution. The Government of Canada proposes that the Canadian Charter of Rights and Freedoms be amended to guarantee property rights. The Government of Canada further proposes that the votes necessary for Parliament or a provincial legislature to invoke the override (section 33) be changed from a simple majority to 60 percent of the members of Parliament or the provincial legislature.

2. Recognition of Quebec's distinctiveness and Canada's linguistic duality. The Government of Canada proposes that a section be included in the Charter stating that the Charter of Rights and Freedoms shall be interpreted in a manner consistent with the recognition of Quebec as a distinct society within Canada. The section would read:

25.1 (1) This Charter shall be interpreted in a manner consistent with

(a) the preservation and promotion of Quebec as a distinct society within Canada; and

(b) the preservation of the existence of French-speaking Canadians, primarily located in Quebec but also present throughout Canada, and English-speaking Canadians, primarily located outside Quebec but also present in Quebec.

(2) For the purposes of subsection (1), "distinct society", in relation to Quebec, includes

(a) a French-speaking majority;
(b) a unique culture; and
(c) a civil law tradition.

(See the Annex at the end of Part I for excerpts from the Charter: present sections 1, 25, 27, 28 and 31 and proposed section 25.1.)

3. Aboriginal participation in current constitutional deliberations. **The Government of Canada is committed to ensuring that aboriginal peoples participate in the current constitutional deliberations.**

4. Aboriginal self-government. The Government of Canada proposes an amendment to the Constitution to entrench a general justiciable right to aboriginal self-government within the Canadian federation and subject to the Canadian Charter of Rights and Freedoms, with the nature of the right to self-government described so as to facilitate interpretation of that right by the courts. In order to allow an opportunity for the Government of Canada, the governments of the provinces and the territories, and aboriginal peoples to come to a common understanding of the content of this right, its enforceability would be delayed for a period of up to 10 years. The Special Joint Committee should examine the broad parameters of the right to be entrenched in the Constitution and the jurisdictions that aboriginal governments would exercise.

5. Aboriginal constitutional process. The Government of Canada proposes the entrenchment of a constitutional process to address aboriginal matters that are not dealt with in the current constitutional deliberations and to monitor progress made in the negotiations of self-government agreements.

6. Representation of aboriginal peoples in the Senate. The Government of Canada proposes that aboriginal representation should be guaranteed in a reformed Senate.

7. A Canada clause in the Constitution. The Government of Canada proposes that a "Canada clause" that acknowledges who we are as a people, and who we aspire to be, be entrenched in section 2 of the Constitution Act, 1867. The Government of Canada believes that it would be appropriate for the following characteristics and values to be reflected in such a statement:

- a federation whose identity encompasses the characteristics of each province, territory and community;
- the equality of women and men;
- a commitment to fairness, openness and full participation in Canada's citizenship by all people without regard to race, colour, creed, physical or mental disability, or cultural background;
- recognition that the aboriginal peoples were historically self-governing, and recognition of their rights within Canada;
- recognition of the responsibility of governments to preserve Canada's two linguistic majorities and minorities;
- the special responsibility borne by Quebec to preserve and promote its distinct society;
- the contribution to the building of a strong Canada of peoples from many cultures and lands;

- the importance of tolerance for individuals, groups and communities;

- a commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations;

- respect for the rights of its citizens and constituent communities as set forth in the Canadian Charter of Rights and Freedoms;

- the free flow of people, goods, services and capital throughout the Canadian economic union and the principle of equality of opportunity throughout Canada;

- a commitment to the well-being of all Canadians;

- a commitment to a democratic parliamentary system of government;

- the balance that is especially Canadian between personal and collective freedom on the one hand and, on the other hand, the personal and collective responsibility that we all share with each other.

Part II: Responsive Institutions for a Modern Canada

*8. **House of Commons.*** The Government of Canada commits itself to a process of further parliamentary reform to give individual MPs more free votes and to reduce the application of votes of confidence.

9. Principles of Senate reform: an elected, effective and more equitable Senate. The Government of Canada proposes that:

- the Senate be directly elected;

- Senate elections coincide with elections to the House of Commons;

- the Senate's composition provide for much more equitable provincial and territorial representation than at present;

- the House of Commons remain the primary legislative body;

- as a general rule, in order for measures to become law, approval of both the Senate and the House of Commons should be required as at present;

- for matters of language and culture, the Senate would also have a double majority special voting rule;

- for matters of national importance, such as national defence and international issues, the Senate would have a six-month suspensive veto. Following expiry of the suspensive veto, the House of Commons would be required to repass the legislation for it to become law;

- since the Senate is not a confidence chamber, the Senate would have no legislative role in relation to appropriation bills and measures to raise funds including borrowing authorities;

- guaranteed representation be provided for aboriginal Canadians in the Senate;

- the Senate continue to have a mandate to conduct special inquiries into issues of public policy.

10. Details of Senate reform. The Government of Canada proposes that the Special Joint Committee of Parliament consider the following issues:

- the form of direct election to the Senate;

- the appropriate number and distribution of Senate seats;

- in consultation with the aboriginal peoples, the appropriate representation of Canada's First Peoples.

11. Senate Ratification of Appointments to Regulatory Boards and Agencies. The Government of Canada proposes that the Senate be given a mandate to ratify the appointment of the Governor of the Bank of Canada and the appointments of the heads of national cultural institutions, such as the Canadian Broadcasting Corporation, the National Film Board, the National Library, the National Archives, the national museums, the Canadian Film Development Corporation, the Canada Council and the National Arts Centre, as well as the heads of regulatory boards and agencies such as the National Energy Board, the National Transportation Agency, the Canadian Radio-television and Telecommunications Commission, the Immigration and Refugee Board, and the proposed Canadian Environmental Assessment Agency.

12. Appointments to the Supreme Court of Canada. The Government of Canada will introduce a constitutional amendment to provide for a role for the provinces and the territories in Supreme Court appointments whereby appointments would be made by the federal government from lists of nominees submitted by provincial and territorial governments, the individual appointed being acceptable to the Queen's Privy Council of Canada.

In addition, the Government of Canada would be prepared to proceed with the entrenchment in the Constitution of the Supreme Court and its composition if it were found desirable to proceed with any unanimity items in the final package.

13. The Constitutional Amending Formula. The Government of Canada would be prepared to proceed with changes to the amending formula as specified in the Meech Lake Accord if a consensus on this matter were to develop; if the accession of existing territories to provincehood were to proceed on the basis of the current amending formula; and if it were found desirable to proceed ultimately with any items requiring unanimous consent in the final package.

Part III: Preparing for a more Prosperous Future

14. Broadening s. 121, the common market clause. The Government of Canada proposes that section 121 of the Constitution Act, 1867 be amended to read as follows:

121. (1) Canada is an economic union within which persons, goods, services and capital may move freely without barriers or restrictions based on provincial or territorial boundaries.

(2) Neither the Parliament or Government of Canada nor the legislatures or governments of the provinces shall by law or practice contravene the principle expressed in subsection (1).

(3) Subsection (2) does not render invalid

(a) a law of the Parliament of Canada enacted to further the principles of equalization or regional development;

(b) a law of a provincial legislature enacted in relation to the reduction of economic disparities between regions wholly within a province that does not create barriers or restrictions that are more onerous in relation to persons, goods, services or capital from outside the province than it does in relation to persons, goods, services or capital from a region within the province; or

(c) a law of the Parliament of Canada or of the legislature of a province that has been declared by Parliament to be in the national interest.

(4) A declaration referred to in paragraph (3) (c) shall have no effect unless it is approved by the governments of at least two-

thirds of the provinces that have, in the aggregate, according to the then latest general census, at least 50 percent of the population of all the provinces.

(5) This section shall come into force on July 1, 1995.

15. Power to Manage the Economic Union. The Government of Canada proposes that the following section be added to the Constitution Act, 1867 immediately after section 91:

91A. (1) Without altering any other authority of the Parliament of Canada to make laws, the Parliament of Canada may exclusively make laws in relation to any matter that it declares to be for the efficient functioning of the economic union.

(2) An Act of the Parliament of Canada made under this section shall have no effect unless it is approved by the governments of at least two thirds of the provinces that have, in the aggregate, according to the then latest general census, at least 50 percent of the population of all the provinces.

(3) The legislative assembly of any province that is not among the provinces that have approved an Act of the Parliament of Canada under subsection (2) may expressly declare by resolution supported by 60 percent of its members that the Act of Parliament does not apply in the province.

(4) A declaration made under subsection (3) shall cease to have effect three years after it is made or on such earlier date as may be specified in the declaration.

The Government of Canada also proposes that the Special Joint Committee consider whether the opting-out provision should be renewable.

16. Harmonization of economic policies. The Government of Canada proposes to develop, with the provinces, an annual timetable to allow for more open and visible budget-making processes.

The Government of Canada proposes to develop, with the provinces, guidelines to improve the coordination of fiscal policies and the harmonization of fiscal policies with Canada's monetary policy. Once approved, these guidelines would be set in federal legislation under the new economic union power. Accordingly, these guidelines would require the approval of at least seven of the provinces representing 50 percent of the population, and up to three provinces could opt out.

The Government also proposes to discuss with the provinces the establishment of an independent agency to monitor and evaluate the macroeconomic policies of the federal and provincial governments.

17. Reforms to the Bank of Canada. The Government of Canada proposes to amend the Bank of Canada Act to make it clear that the mandate of the Bank is to achieve and preserve price stability. To ensure regional representation on the Board of Directors of the Bank of Canada, the Government will solicit the views of provincial and territorial governments and consult with them before making appointments to the Board. In addition, the Government proposes to create regional consultative panels to advise the Directors of the Bank on regional economic conditions. The Government will also solicit the views of provincial and territorial governments with respect to the membership of the regional panels. Moreover, the appointment of the Governor of the Bank of Canada would be subject to Senate ratification.

18. Training. The Government of Canada proposes that section 92 of the Constitution Act, 1867 be amended to recognize explicitly that labour market training is an area of exclusive provincial jurisdiction.

19. Immigration. While recognizing the federal role in setting Canadian policy and national objectives with respect to immigration, the Government of Canada is prepared to negotiate with any province agreements appropriate to the circumstances of that province and to constitutionalize those agreements.

20. Culture. The Government of Canada will negotiate with the provinces, upon their request, agreements appropriate to the particular circumstances of each province to define clearly the role of each level of government. Where appropriate, such agreements would be constitutionalized.

21. Broadcasting. The Government of Canada proposes to:

1. consult with the provinces on the issuance of new licences;

2. provide provincial governments and their agents with the opportunity to evolve into full public broadcasting undertakings with varied programming, subject to CRTC regulation;

3. further regionalize the operations of the CRTC and expand the roles of its regional offices;

4. allow for provincial participation in the nomination of regional commissioners of the CRTC.

22. The Residual Power. The Government of Canada proposes to reserve to itself the Peace, Order and Good Government clause of the Constitution Act, 1867 to maintain its authority to deal with national matters or emergencies. However, the Government of Canada is prepared to transfer to the provinces authority for non-national matters not specifically assigned to the federal government under the Constitution or by virtue of court decisions.

23. The Federal Declaratory Power. The Government of Canada is prepared to support a constitutional amendment to remove the declaratory power set out in section 92(10)(c).

24. Recognizing Areas of Provincial Jurisdiction. Within this framework, the Government of Canada is committed to ensuring the preservation of Canada's existing research and development capacity obligations for international and native affairs. The Government of Canada is prepared to recognize the exclusive jurisdiction of the provinces and discuss how best to exercise its own responsibilities in a manner appropriate to the sector in the following areas:

- tourism
- forestry
- mining
- recreation
- housing
- municipal/urban affairs

25. Legislative Delegation. The Government of Canada endorses the recommendation of the Beaudoin-Edwards Joint Parliamentary Committee that there be a constitutional amendment providing for delegation of legislative powers between Parliament and the legislatures, and that there be provisions inserted in the Constitution to enable the delegation of legislative authority between the two levels of government with the mutual consent of the legislative bodies involved.

26. Candidates for Streamlining. In order to provide Canadians with the best service at the lowest possible cost, the federal government is prepared to discuss with the provinces the rationalization of government programs and services by reviewing which level of government can best deliver them. All proposals from the provinces will be considered. As a starting point, the Government proposes to discuss the following areas with the provinces:

- drug prosecutions
- wildlife conservation and protection
- transportation of dangerous goods
- soil and water conservation

- ferry services
- small craft harbours
- some aspects of financial sector regulation
- some aspects of bankruptcy law
- some aspects of unfair trade practices
- inspection programs

27. The Exercise of the Federal Spending Power in Areas of Exclusive Provincial Jurisdiction. The Government of Canada commits itself not to introduce new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction without the approval of at least seven provinces representing 50 percent of the population. This undertaking would be entrenched in the Constitution. The constitutional amendment would also provide for reasonable compensation to non-participating provinces which establish their own programs meeting the objectives of the new Canada-wide program.

28. Working Together: a Council of the Federation. The Government of Canada proposes the entrenchment of a Council of the Federation, composed of federal, provincial and territorial governments, that would meet to decide on issues of intergovernmental coordination and collaboration. The Council would have the mandate to vote on proposed federal legislation to enhance the functioning of the economic union under the proposed new head of power; to vote on guidelines for fiscal harmonization and coordination as well as to decide on processes to improve future collaboration in this area; and to make decisions on the use of the federal spending power on new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction. All decisions of the Council of the Federation would require the approval of the federal government and of at least seven provinces representing 50 percent of the population.

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APPENDIX 2

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Annex

Recognizing Quebec's Distinctiveness in the Canadian Charter of Rights and Freedoms

The following is the present sections 1, 25, 27, 28 and 31 and the proposed section 25.1:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

    (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

    (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. (92)

25.1 (1) This Charter shall be interpreted in a manner consistent with

(a) the preservation and promotion of Quebec as a distinct society within Canada; and

(b) the preservation of the existence of French-speaking Canadians, primarily located in Quebec but also present throughout Canada, and English-speaking Canadians, primarily located outside Quebec but also present in Quebec.

(2) For the purposes of subsection (1), "distinct society", in relation to Quebec, includes

(a) a French-speaking majority;
(b) a unique culture; and
(c) a civil law tradition.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

31. Nothing in this Charter extends the legislative powers of any body or authority.